November 8, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard,* **MB Docket 16-142**

Dear Ms. Dortch:

On November 6, 2017 Michael Calabrese of New America's Open Technology Institute (OTI) and Phillip Berenbroick of Public Knowledge (hereinafter the "Consumer Advocates"), met with Holly Saurer, acting media advisor to Commissioner Mignon Clyburn, concerning the proceeding referenced above.

The Consumer Advocates began by expressing their strong support for the draft Order's simulcasting requirement and, in particular, for requiring a future notice-and-comment rulemaking prior to any authorization for a local station to discontinue its current DTV (ATSC 1.0) primary stream. Our groups also support the conclusion that broadcasters' public interest obligations, including the required number of hours of children's programming, local news and video captioning, should apply independently to both the ATSC 3.0 transmission and a station's 1.0 stream.

Although the draft Order would protect over-the-air viewers from a premature flash-cut transition, the Advocates expressed continuing concern – and proposed a change concerning – three aspects of licensees' ongoing public interest obligation to broadcast a primary DTV stream in ATSC 1.0:

First, we suggested that the "substantially similar" content requirement should not sunset after five years, but should instead be reconsidered, along with the timing of a permanent transition, in the Commission's future rulemaking. Under the draft Order, after five years local stations could decide to pull sports and other popular programming from their 1.0 DTV stream, which effectively allows individual stations to coerce a permanent transition without actually giving the Commission an opportunity to reassess the costs and benefits of ATSC 3.0 as it evolves. And since ATSC 3.0 may not be deployed or well known to consumers for another two-to-four years, or longer, any such loss of

programming will hit consumers virtually without warning, leaving them little time (certainly far less than 5 years) to acquire new TV sets or converter boxes.

Second, the Advocates argued that the 5 percent coverage loss threshold is too high and that the Commission should not approve applications higher than that amount. We suggested that the Order should be amended to establish a "rebuttable presumption" that a station sharing agreement will be rejected if it results in more than 5 percent loss of coverage in the community of interest so that, at a minimum, stations have a stronger incentive to take affirmative steps to minimize coverage loss. The loss of "expedited processing" is not a strong enough incentive, in our view, to encourage stations to consider, among other expedients, a more expensive tower siting, or to supply dongles to viewers who would otherwise lose coverage.

Third, the Consumer Advocates expressed their concern about whether consumers will continue to receive their local station content in a high-definition, ATSC 1.0 format that is compatible with current television sets. The Advocates suggested that the Order should require local stations to disclose any planned degradation in signal quality as part of their channel-sharing application – and the Commission should consider whether such a large coverage loss is necessary as part of its review and decision to approve the application. We believe this will encourage at least some local stations to take steps to avoid downgrading signal quality, such as by pursuing three-station arrangements whereby, at least initially, two of the three channels could remain dedicated to ATSC 1.0.

The Advocates also expressed their concern that the draft Order does nothing to constrain broadcast licensees – and, in particular, powerful station groups – from using their leverage over retransmission consent to coerce MVPDs to carry ATSC 3.0 programming on their platforms. This could both increase the already excessive costs for local broadcast content being passed along to consumers and potentially crowd out independent programming on channels unaffiliated with broadcast networks or station groups. A truly "voluntary" ATSC 3.0 transition must mean that pay TV providers are not coerced to carry ATSC 3.0 signals and pass the costs along to consumers, as inevitably occurs with retrains consent fees. In our joint comments and reply comments, our groups support including a narrow change to the good faith bargaining rule that would make it a *per se* violation for either party to tie retransmission consent fees for the current free stream (ATSC 1.0) to the carriage of ATSC 3.0.

Finally, the Consumer Advocates expressed dismay that the request by some broadcast interests to use vacant channels ("TV White Space") for the transition is not being summarily rejected in the Order. As recently as two weeks ago the National Association of Broadcasters continued to state, as they did in their original Petition for Rulemaking and reply comments to oppositions, that an ATSC 3.0 transition would not only be "voluntary," but it would require no additional grant of spectrum. "Notably, a transition to Next Gen TV requires broadcasters to use no additional spectrum," the NAB stated in a press statement on October 27, 2017.[1]

As the industry has acknowledged, an on-channel transition is entirely feasible and is, in fact, the entire basis for the channel sharing authorization in this Order that will already give them extra capacity

[1] National Association of Broadcasters, "NAB Statement on Next Gen TV on FCC Novembee Agenda" (Oct. 27, 2017), available at https://www.nab.org/documents/newsroom/pressRelease.asp?id=4268.

for new fee-based services. Any attempt to leverage the purely hypothetical consumer benefits of ATSC 3.0 into a spectrum windfall at taxpayer expense is a classic bait-and-switch. Some broadcast interests apparently believe that this FCC is far more willing to confer a corporate welfare grant on their companies than was the case 16 months ago. We hope this is not true.

The Advocates further stated that although the capability of local stations to broadcast video content directly to smartphones, tablets and other mobile devices could be beneficial to consumers, broadcasters are already using ATSC 3.0 to free up channels of free spectrum to compete directly with mobile carriers, and should not be permitted to grab *even more free spectrum* for exclusive use while their competitors in the mobile video market must pay for their spectrum at auction. It is important to keep in mind that unlike most other licensees, broadcasters have received their exclusive licenses free of charge for the express purpose of providing free over the air broadcasting to their local communities – *not* to facilitate their roll-out of new fee-based services or to compete with a mobile industry that pays for spectrum.

Punting this issue to the Further Notice has high costs, since it will considerably extend the uncertainty over whether there will be sufficient unlicensed access to TV White Space channels in every market nationwide. The collateral damage to rural broadband deployment and on the willingness of chipmakers to integrate the finished IEEE 802.11af standard into Wi-Fi chips for consumer devices would be substantial. The Commission should decide this now or, at worst, allow it to be reconsidered in four-to-five years when the broadcasters return for a rulemaking on the timing and process for a permanent transition that discontinues the current DTV (1.0) stream.

Respectfully submitted,

/s/ *Michael Calabrese*
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cc: Holly Saurer